WENG NENG MEDICAL & LIQUOR (KL) SDN. BHD.

v.

FOUNTAIN INDUSTRIES SDN. BHD.

HIGH COURT, SHAH ALAM
DATO' JAMES FOONG J.
[CIVIL APPEAL NO. 11-7-91]
7 MAY 1994

LABOUR LAW: Claim for wages - Employer's properties under distress - Auction - Whether employees entitled to priority payment over proceeds of sale of properties - Employment Act 1955, s. 31.

LANDLORD & TENANT: Distress action by landlord - Auction of movable properties of tenant - Intervener action by employees of tenant against proceeds of sale - Employees not working at demised premises - Section 31 Employment Act 1955 - Whether complied with - Whether right of landlord to proceeds of sale thereof adversely affected.

PRACTICE & PROCEDURE: Intervener proceedings - Interveners had not formally applied to intervene but accepted as a party by the Court - Whether interveners had locus standi.

WORDS AND PHRASES: "decree" - Section 31 Employment Act 1955.

The appellants, the landlords of a certain warehouse, took out a writ of distress against the respondents, the tenants thereof, to recover arrears in rental amounting to RM12000. In consequence thereof, a distress warrant was issued by the Magistrate's Court, Klang, with the result that the relevant movable properties of the respondents were thereafter seized and auctioned off by the bailiff of the Court.

The appellants applied to the said Court for the release of the sum due to them but before the application was heard, five employees of the respondents intervened and claimed their wages amounting to RM15244.27 from the proceeds of sale, arguing thereby that they were entitled to priority payment thereto under s. 31 of the Employment Act 1955. Section 31 of the Act did however make provision for such priority payment provided that the claiming employees were working at the premises at the time the properties were auctioned.

The Magistrate dismissed the appellants' application and ordered the release of the proceeds of sale to the five employees. The appellants appealed and argued *inter alia*, that s. 31 was not applicable as the employees herein were not working at the warehouse at the time the properties were auctioned off. The employees thereafter sought to introduce an affidavit purportedly to bring forth the assertion that at the time of the auction they were in fact working at the warehouse. The appellants objected and contended that the effort amounted to an attempt to introduce fresh evidence which in the circumstances ought not to be allowed.

Held:

[1] The Magistrate had failed to consider the absence of any evidence to show that the five employees were in fact working at the demise premises at the material time. There was no denial to the appellants' allegation that the respondents never employed any employees to work at the demise premises at the material time and such allegation ought therefore to be taken as the truth. That being the case, the five employees had failed to qualify for priority payment under the proviso of s. 31 Employment Act 1955. They are thus not entitled to the proceeds of sale in priority to the appellants.

[2] The attempt to introduce fresh evidence to show that the employees were working at the demise premises at the time the properties were auctioned, should not and cannot be allowed. The employees had clearly failed to satisfy the first condition laid down in *Ladd v Marshall* [1954] 1 WLR 1489 for the admission of such evidence. The evidence in question could have been obtained with reasonable diligence and tendered at the trial before the Magistrate. This the employees failed to do and they cannot be allowed to do it now.

[3] The order of the Registrar issuing the warrant of distress, unless it is set aside, stands as a final order of the Court and therefore the said order is a decree within the meaning of s. 31 Employment Act 1955. Hence that section is applicable in this case.

[4] Though the employees had not formally applied to intervene in these proceedings, the facts showed that they were at all material times being accepted by the Magistrate as a party. As such they ought to be taken as proper parties to the proceedings.

[Appeal allowed. Appellants' writ of distress ordered to be satisfied].

Cases referred to:
Ladd v. Marshall [1954] 1 WLR 1489 ***(foll)***
Chai Yen v. Bank of America National Trust and Saving Ass. [1980] 2 MLJ 142 ***(cit)***
Lam Soon Cannery Co. v. Hooper & Co. [1965] 2 MLJ 148 ***(cit)***
Lee Chow Moi v. Chia Chin Foo [1923] FMSLR 167 ***(not foll)***

Legislation referred to:
Employment Act 1955, s. 31

Other sources referred to:
Dictionary of English Law, Vol. I 1959
Stroud's Judicial Dictionary, 5th Edn. 1986

For the appellants - T.L. Gan; M/s Yong & Partners
For the respondents - Balan; M/s Seah Balan Ravi & Co.

JUDGMENT

James Foong J:
The appellants in this case were the landlords of a certain premises known as 105, Jalan Satu, Kaw. 3 Taman Klang Jaya, Klang, Selangor (which I shall hereinafter refer to as the demise premises). The respondents were the tenants.

On or about 17 April 1989 a writ of distress was issued by the appellants against the respondents to distrain the movable properties of the respondents in the demise premise to recover a sum of RM12,000 being arrears of rental. In consequent to this, an order for the issue of a warrant of distress was granted by the Registrar of the Klang Magistrate Court. Acting upon this warrant of distress the bailiff seized the properties of the respondents on the demise premises and subsequently auctioned it off. The net proceeds of the auction was deposited in the Klang Magistrate Court. The appellants then made an application to the said Court for the release to them the sum due on the arreas of rental out of the proceeds of sale. Before this application was heard, the said Court received a letter from the Labour Office alleging that 5 employees of the respondents whose salaries amounting to RM15,244.77 was not paid by the respondents and, under s. 31 of the Employment Act 1955, these employees are entitled to priority payment from the proceeds of the sale of the respondents' properties over other creditors.

On 9 August 1989, the application of the appellants for the release to them of the proceeds of sale was heard before the Klang Magistrate. From the Appeal Records one Mr. David, apparently a Labour Officer appeared supposedly for the 5 employees.

The learned Magistrate after hearing submissions from the appellants and Mr. David dismissed the appellants' application. He further ordered that the proceeds of sale be released to the 5 employees after the Labour Office has ascertained their claim in an enquiry. It is in respect of this decision that the appellants are now appealing against.

When this appeal first came up for hearing, the 5 employees were now represented by their Counsel Mr. Balan. I enquired on the *locus standi* of his clients in these proceedings as I find no record of an order allowing them to intervene. I adjourned this matter for the parties to submit on the issue of *locus standi*. At the next hearing of this appeal Mr. Balan applied on behalf of the 5 employees to intervene in these proceedings. To support this application one of the employees representing the 5 filed an affidavit. The admission of this affidavit was objected to by the appellants' Counsel for reason that it contains materials which are not disclosed earlier and this would amount to the admissibility of fresh evidence. The part that is most vehemently opposed to is the assertion by the employees that they were employed and working at the demise premises at the time when the auction was carried out. This issue is material for reason that before s. 31 of Employment Act is applicable the employees must be working at the place where the goods were auctioned off. Though the appellants had in their affidavit filed before hearing of the application before the Magistrate, asserted that no employees were working at the demise premises at the time when the respondents' properties were auctioned, no denial of any form came from the employees until now. To introduce this assertion at this stage will according to the appellants' Counsel, not only introduce fresh evidence but also would cover up any defects in the employees' claim.

After careful consideration of the evidence in the Appeal Records and the sequence of events, I find that though the 5 employees had not formally applied to intervene in these proceedings they have, in fact at all material times being accepted by the Magistrate as a party. The entertainment of the letter from the Labour Office by the Court, the hearing of the submissions by Mr. David representing the 5 employees and, the order of the Magistrate

directing payments from the proceeds of the auction to the 5 employees after an inquiry, are all acts and conducts of acceptance of these employees as an intervening party to the proceedings.

Arising from this, I find that any attempt to introduce the employees' affidavit at this stage of the proceedings where, fresh evidence is alleged to contain therein should not be allowed. In the first place, there is no necessity for this affidavit to be filed since the employees were and are already parties to these proceeding. Secondly, the introduction of fresh evidence require the fulfillment of the 3 conditions as stated in the celebrated case of *Ladd v. Marshall* [1954] 1 WLR 1489 which is adopted in our Malaysian Law through the cases of *Chai Yen v. Bank of America National Trust and Saving Ass.* [1980] 2 MLJ 142 and *Lam Soon Cannery Co. v. Hooper & Co.* [1965] 2 MLJ 148. The 3 conditions are:

(a) that it must be shown that the evidence could not have been obtained with reasonable deligence for use at trial;
(b) that the evidence must be such, that if given would probably have an important influence on the result of the case, though need not be decisive;
(c) that the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible through need not be incontrovertible.

I find that the employees have failed to satisfy the first condition. The appellants have made allegations that no employees were working in the demise premises at the time of the auction at the earliest possible stage of these proceedings. Though the 5 employees had every opportunity to deny this fact, it was not being done. Their representative the Labour Office were aware of the importance of this material fact. This is evidence by their letter to the Magistrate Court which refers to this prerequisite condition in order to qualify for priority payment. The evidence on this matter could have with reasonable deligence been obtained and tendered at the trial before the Magistrate. Since the employees have failed to do so it cannot be admitted now.

I need not proceed with the second and third condition for failure of any one of the three conditions in respect of the admission of fresh evidence at this stage would be sufficient to justify the rejection of these new evidence.

The next issue is whether the evidence as it stands in the Appeal Records do justify the Magistrate in arriving at this decision.

The appellants argued that besides s. 31 of Employment Act not being applicable to employees who were not working at the demise premises at the material time, the warrant of distress obtained from the Court is also not a "decree". As it is not a "decree", s. 31 of the Employment Act is not applicable to the employees. This contention arise from the use of the word "decree" in s. 31 of the Employment Act which reads as follows:

> where by order of a Court made upon the application of any person holding a mortgage, charge, lieu or decree (hereinafter referred to as "the secured creditor") ...

To support their contention the case of *Lee Chow Moi v. Chia Chin Foo* [1923] FMSLR 167 was cited. In this case, the Judicial Commissioner in 1923 ruled that a distress warrant is not a decree for reason that it is made upon an *ex parte* proceeding. Frankly I find no justification whatsoever for the support of this principle.

A "decree" is defined in the **Dictionary of English Law**, Vol. I 1959 as:

> an order of the Court pronounced on hearing of a suit, now mainly used in matrimonial suits.

From the proceeding paragraphs of the definition in this dictionary, I am of the view that this is an old English legal term used in the English Courts during the time when the Courts of equity and common law were distinct and separate. For all intent and purposes it amounts to "a final order of a Court in a suit" as defined in **Stroud's Judicial Dictionary**, 5th Edn., 1986.

When the writ of distress in this case was filed the Klang Magistrate Court, though made *ex parte*, it was heard by the Registrar before an order to issue a warrant of distress was made. The Registrar must have considered all relevant facts disclosed in the supporting affidavit of that application before coming to his decision. His decision handed down in the form of an order stands as a final order of the Court unless it is set aside. Under such circumstances, as this order of the Registrar was pronounced after a hearing and that it is a final order unless set aside, it must be a decree. As the order for the issue of a warrant of distress is a decree s. 31 of the Employment Act is applicable in this case.

The second question to be answered now is whether the employees were working at the demise premises when the auction took place. On this, I find that the learned Magistrate has failed to consider the absence of any evidence that these 5 employees were working at the demise premises at the material time. There is no denial to the appellants' allegation that the respondents never employed any employees to work at the demise premises which was a ware house. When there is no such denial then such contention can be considered as the truth. This being the case, the employees have failed to qualify for priority payment under the proviso of s. 31 of the Employment Act 1955. They are therefore not entitled to the proceeds of sale in priority to the appellants.

I therefore allow this appeal with cost and order that sufficient amount of the proceeds of sale in the Klang Magistrate Court be released to the appellants to satisfy the writ of distress.

YEOH TIONG LAY & SONS HOLDINGS SDN. BHD.

v.

ANNAVI S/O MOOKAN & ANOR. AND DEKOR PANEL EMAS SDN. BHD. (INTERVENER)

HIGH COURT, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[CIVIL SUIT NO. 22-324-90]
20 AUGUST 1993

CONTRACT: Land offered for sale to plaintiff by 1st defendant on behalf of beneficiaries of land - Offer confirmed by letter - Sale subject to consent of 2nd defendant - 2nd defendant under receivership - Receivers not consenting - Plaintiff informed sale aborted - Plaintiff claimed letter binding contract - Plaintiff filed caveat on land - Plaintiff filed civil suit against defendants for specific performance and ancillary reliefs - Whether plaintiff had enforceable contract for purchase of land.

TRUST: Land held on irrevocable trust by 2nd defendant on behalf of beneficiaries - 2nd defendant registered proprietor of land - Whether beneficiaries had capacity to make an enforceable contract of sale.

PRACTICE & PROCEDURE: Order 15 r. 12(1) & (2) RHC - Application by plaintiff to appoint 1st defendant as representative of all beneficiaries - Whether 1st defendant authorised by all beneficiaries - Application by plaintiff to reamend amended statement of claim - Whether reamendment was of substance.

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application by 1st defendant to strike out plaintiff's action dismissed by SAR - Appeal by 1st defendant - Whether appeal had merit - Application by 2nd defendant to strike out plaintiff's action allowed by SAR - Appeal by plaintiff - Whether SAR correct - Whether appeal had merit.

PRACTICE & PROCEDURE: Receivers entered into sale and purchase agreement of land with interveners - Interveners unable to register transfer because of plaintiff's caveat - Extension of caveat granted by the Court - Application by intervener to remove caveat.

LAND LAW: Whether filing of caveat by plaintiff calculated to frustrate sale of land to intervener - Whether actions of plaintiff malicious - Whether there were any grounds for exemplary or punitive damages.